Teamsters Local 955, affiliated with International Brotherhood of Teamsters, AFL–CIO (Interstate Brands Corporation) ***and*** **Kenneth D. A. Bunton.** Case 17–CB–4731

April 9, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HURTGEN

On August 28, 1997, Administrative Law Judge D. Randall Frye issued the attached decision. The General Counsel filed exceptions and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

CHAIRMAN GOULD, concurring.

I join the majority in finding that the Respondent did not violate Section 8(b)(1)(A) by refusing to agree to the crediting of pension fund contributions for nonstriking employees during the pendency of the strike. In the instant case, there is no contention that the Respondent Union failed to bargain with the Employer over the crediting of the pension fund contributions. If such a failure had been alleged and established, I would find that the Union had failed to meet its bargaining obligations under Section 8(b)(3) of the Act.

The Board has found that the obligation to bargain in good faith requires an employer to bargain with a striking union over the terms and conditions under which nonstriking employees will work and to refrain from making unilateral changes in those conditions. *River City Mechanical*, 289 NLRB 1503, 1505 (1988); *Schmidt-Tiago Construction Co.*, 286 NLRB 342 (1987).[1] This good-faith bargaining obligation applies equally to the union and requires the union to refrain from exercising any ability it may possess to implement unilateral changes in the employees' terms and conditions of employment. *Teamsters Local 334 (Halle Bros.)*, 253 NLRB 1090, 1091 (1981), enf. denied 670 F.2d 855 (9th Cir. 1982) (unilateral changes in union health plan); *Communications Workers Local 1170 (Rochester Telephone)*, 194 NLRB 872, 875 (1972), enfd. 474 F.2d 778 (2d Cir. 1972) (embargo on unit employees acceptance of temporary supervisory positions); *New York Painters District Council 9 (Westgate Painting)*, 186 NLRB 964, 965–966 (1970), enfd. 453 F.2d 783 (2d Cir. 1971), cert. denied 408 U.S. 930 (1972) (unilateral rule limiting weekly number of rooms to be painted by unit employees). Just as Section 8(a)(5) forbids employers from unilaterally changing the terms and conditions of employment of nonstriking employees, Section 8(b)(3) forbids a union from making unilateral changes in the terms and conditions of these employees. And, in my view, this principle is equally applicable to the terms and conditions of striker replacements.

Accordingly, I would apply the above analysis when, during a strike, a union unilaterally changes the working conditions of nonstriking employees and striker replacements and would find such action to violate Section 8(b)(3) of the Act.

[1] At sec. II,B,1 of his decision, the judge inadvertently stated that a contract ratification meeting occurred on July 24, 1995. As noted elsewhere in his decision, the correct date of this meeting was July 24, 1994.

[2] We decline to comment on the issues raised by our concurring colleague. As he acknowledges, there is no allegation that any party violated any bargaining obligation. In these circumstances, we do not pass on hypothetical issues concerning the scope of bargaining obligations under Sec. 8(a)(5) or 8(b)(3) of the Act.

[1] In my own view, an employer's duty to bargain should encompass all unit employees, including strikers, replacements, nonstrikers and returning strikers, because the union represents all unit employees. As such, the employer may not unilaterally change the replacements' conditions of employment, but must bargain with the union in good faith until impasse is reached. At impasse, an employer may unilaterally implement only those terms and conditions in regard to the replacements that are consistent with its last offer to the Union. *Chicago Tribune Co.*, 318 NLRB 920, 928 fn. 30 (1995).

Lyn Buckley, Esq., for the General Counsel.
Steve A. J. Bakaty, Esq. (Blake & Uhlig, P.A.), of Kansas City, Kansas, for the Respondent.

DECISION

STATEMENT OF THE CASE AND BACKGROUND

D. RANDALL FRYE, Administrative Law Judge. This case was tried before me on March 5, 1997, in Overland Park, Kansas. The underlying complaint issued on October 30, 1995, based on a charge filed on June 19, 1995, and amended on October 6, 1995.

During the course of the trial, the parties were afforded a full opportunity to be heard, to call, to examine and cross-examine witnesses, and to introduce relevant evidence. After close of hearing, briefs were timely filed by the Respondent and counsel for the General Counsel. On the entire record, including my observation of the demeanor of the witnesses, and after fully considering the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

Interstate Brands Corporation (Interstate), is engaged in the manufacture, distribution, and wholesale of bakery products at various locations in Missouri. Interstate annually purchases and receives goods and materials valued in excess of $50,000 directly from supplies located outside the State of Missouri and annually sells and ships goods valued in excess of $50,000 to customers located outside the State of Missouri. Respondent admits and I find that the Association is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent Teamsters Local 955, affiliated with International Brotherhood of Teamsters, AFL–CIO admits and I find that it is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges that Respondent violated Section 8(b)(1)(A) of the Act by refusing to agree to acceptance by the Central States Pension Fund (Pension Fund or Fund) of contributions made by the Company on behalf of nonstriking employees. Counsel for the General Counsel contends that Respondent, by this refusal, has unlawfully restrained and coerced employees in the exercise of rights guaranteed by Section 7 of the Act.

A. *Facts*

The Respondent and the Company have had a collective-bargaining relationship for many years and have been parties to numerous successive collective-bargaining agreements. Among other things, the successive agreements included a provision for pension payments by Respondent into the Central States Pension Fund.

The contract in question was effective from March 18, 1990, to March 20, 1993. However, Respondent did not timely reopen and the agreement was extended for 1 year. The parties began bargaining in late 1993 but were unable to reach agreement. As a result, the Union struck the Company from April 1 to August 8, 1994. According to Ralph Smith, Respondent's chief negotiator and then secretary-treasurer, 30 percent of the bargaining unit crossed the picket lines during the early part of April but by the end of the strike, approximately 70 percent had crossed.

During a negotiating meeting just prior to the strike, Smith proposed to Trumon Holman, the Company's chief negotiator, that the parties enter into an interim agreement which would, inter alia, permit all bargaining unit employees to continue to work and the Company would continue to make pension contributions to the Central States Pension Fund pending a new contract. This proposed agreement was on a preprinted form supplied by Central States Pension Fund. The Company refused to consent to this agreement.

During the course of the strike no employees received pension fund credit, even through the Company made regular payments to the Fund on behalf of nonstriking employees. According to Holman, when the Fund refused to credit the accounts of nonstriking employees, he telephonically inquired of officials of the Fund as to why it refused to credit the payments. In June 1994, having been informed by Fund officials that it could not credit pension payments absent an agreement from Respondent, Holman called Ralph Smith. In this conversation, Holman asked Respondent to agree to Pension Fund payments for nonstriking employees to which Smith replied,''[H]e wasn't going to do anything to help scabs, and the only way he would help scabs would be if the Company would make contributions on behalf of the employees who are striking.'' Holman further testified that he had similar conversations with Smith after the strike.

Smith credibly testified that Respondent's refusal to execute an agreement which would permit the Fund to accept the tendered payments on behalf of nonstriking employees was an integral part of Respondent's overall bargaining strategy. Smith further stated that he proposed to the Company an interim agreement which would have provided for the continuation of all benefits pending a new collective-bargaining agreement but the Company rejected this proposal.

On July 21, 1994, the parties met for the first time since the strike began. During this session, the Company presented its final offer. Smith proposed that the contract be made retroactive to the expiration date of the prior agreement. However, the Company rejected this proposal which would have, inter alia, provided pension benefits to nonstriking employees who worked during the strike.

Although the Union was not happy with the terms of the proposed agreement, it was compelled to present it to the employees as the Company had presented it as its final offer. Accordingly, a ratification meeting was held on July 24, 1994. Smith presented the proposed agreement to those in attendance and explained, among other things, that the contract would not be retroactive. With respect to the issue of pensions, Smith testified that ''we touched on that for a long time.'' Charging Party Bunton was in attendance at this meeting.

The contract, as proposed by the Company, was ratified at the July 24, 1994 meeting and employees began returning to work during the first week of August 1994. However, Charging Party Bunton testified that he did not become aware of the refusal by the Pension Fund to credit the Company's pension payments during the strike until he received a May 1995 letter from the Fund. (G.C. Exh. 14.) This unsigned letter, written on Fund stationary provided Bunton (and other Pension Fund participates), with a summary of his work history for calendar year 1994. Based on the information in this letter, Charging Party Bunton learned that no pension contributions were credited for the period that he worked during the strike. Thereafter, he filed a charge against the Company and learned that contributions had been made by the Company but not credited by the Pension Fund. Accordingly, he withdrew this charge and filed a charge against Respondent alleging that its refusal to execute an agreement permitting the Pension Fund to credit payments from the Company on behalf of nonstriking employees violated Section 8(b)(1)(A) of the Act.

B. *Decision*

1. Application of Section 10(b)

Respondent argues that the complaint should be dismissed because the alleged unfair labor practice took place in June 1994, and the charge was not filed until June 19, 1995, well beyond the statute of limitations. The Charging Party testi-

fied that he did not become aware of the alleged unlawful conduct until he received the May 1995 letter from the fund, after which he promptly filed the above-referenced charges. The Charging Party further testified that while he attended the July 24, 1995 ratification meeting, during which the proposed contract was explained, he did not recall a specific discussion of pension benefits for nonstriking employees. He did recall being advised by Smith that the proposed contract would not be retroactive. Moreover, while Charging Party Bunton stated that he did visit the union hall once during the strike, he did not receive any information with respect to pension benefits.

Under these circumstances, I conclude that the Charging Party did not have knowledge, actual or constructive, of the alleged unlawful conduct until receipt of the May 1995 letter from the Pension Fund. Thus, the charge filed on June 19, 1995, as well as the amended charge filed on October 6, 1995, were timely filed. I specifically reject Respondent's argument that the Charging Party knew or should have known of the alleged unlawful conduct based on his attendance at the July 24, 1995 ratification meeting and the Union's wide dissemination of information concerning the absence of pension fund coverage during the strike. As to this argument, Respondent's evidence does not establish that Bunton understood that there would be no pension coverage during the strike. Respondent submits that Smith's testimony that he ''touched . . . the effects of ratifying a contract that was not retroactive,'' sufficiently informed Bunton. However, as earlier noted, Bunton testified that he did not leave this meeting with an understanding that he would not receive pension credit for the time he worked during the strike. Further, while Respondent may have disseminated pension related information orally through the union leadership and by distributing copies of a May 31, 1994 letter from the Fund to Smith at the union hall, Bunton credibly testified that he did not receive this information. Thus, as to Bunton, I find that he did not have actual knowledge until May 1995. However, Respondent further argues that Bunton had at least, constructive knowledge based on these same facts. Should Respondent's argument on this issue prevail, the result would impose on charging parties, many of whom are unschooled in the complexities of labor-management relations, the obligation to learn by happenstance, of facts critical for protecting their statutory rights. Neither the Act nor Board precedent permits such a result. Accordingly, I conclude that Bunton did not have constructive notice and the charge he filed was timely.

As to the allegations embodied in the October 6, 1995 amended charge, which included all unit employees, similarly situated to Bunton, a different result much obtain. Section 10(b) of the Act is jurisdictional and the General Counsel has the specific burden of establishing this statutory requirement. To this end, counsel for the General Counsel submits that all individuals similarly situated to Bunton are entitled to protection of the Act pursuant to his timely filed charge. However, Bunton credibly testified at the hearing that he first learned of the alleged unlawful conduct in May 1995. Although clearly known to the General Counsel, none of these similarly situated individuals were called to testify. As a result, the record is totally void of any evidence which would support a conclusion that these individuals lacked knowledge of the alleged unfair labor practice until May 1995. Accordingly, the complaint shall be dismissed with respect to these individuals.

2. Breach of the duty of fair representation

Counsel for the General Counsel argues that Respondent's refusal to agree to Pension Fund payments for nonstriking employees was conduct designed to punish those employees who crossed the picket line. It is further argued that Respondent's ill motive and animus toward nonstriking employees is evidenced by Smith's admitted statements to the effect that he would do nothing for scabs. In view of these circumstances, the General Counsel contends that Respondent engaged in invidious and arbitrary conduct in violation of Section 8(b)(1)(A) of the Act. For the following reasons, I disagree. A union breaches its duty of fair representation if it takes action in its representative capacity against unit employees for irrelevant, invidious, or unfair reasons. *Miranda Fuel Co.*, 140 NLRB 181 (1962). However, the Board and courts have long held that collective-bargaining agents must be allowed a wide range of reasonableness in discharging its responsibilities. Thus, in *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), the Supreme Court stated:

> Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interest of the parties represented. . . . Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Compromises on a temporary basis, with a view to long-range advantages, are natural incidents of negotiation.

In *Plumbers Local 66 (Tri-State Mechanical)*, 287 NLRB 583 (1987), the Board, in applying the *Ford Motor* standard, stated, ''These principles are equally applicable to both the tactics and substance of bargaining.''

In the instant case, Respondent was endeavoring to negotiate a collective-bargaining agreement for the benefit of the entire unit. When a strike ensued, it declined to piecemeal negotiations and refused to execute a separate agreement which would have permitted the Fund to accept pension payments from the Company. On this subject, Business Agent Smith, credibly testified that entering such an agreement would have further weakened his bargaining position with respect to the current dispute as well as jeopardize Respondent's bargaining strength in future contract negotiations. In my view, this is precisely the kind of strategy contemplated by the Board in *Tri-State Mechanical*. There, the Board dismissed 8(b)(1)(A) charges where the union refused to agree to permit the trust funds to receive fringe benefits contributions on behalf of unit employees employed by nonsignatory members of the employer association. With respect to the unions' conduct, the Board noted as significant, the follow-

ing; (1) there is no indication that the unions rejected and caused the rejection of benefit contributions in order to punish nonstrikers; (2) the union took the action to apply additional economic pressure on the employer association nonsignatory members in support of its strike; (3) the unions took the action in an attempt to achieve at least a satisfactory bargaining agreement for the benefit of all unit employees; and (4) the strike, and the action taken to support it was not intended to be permanent. In dismissing this case, the Board observed that ''the adverse effects of the actions on nonstrikers are natural incidents of negotiations; they are compromises of a temporary nature with Respondent view to long-range advantages to the whole unit.''

Although the issues in the present case are somewhat clouded by Business Agent Smith's admitted comments about not desiring to help scabs, I find, in view of all the circumstances, that Respondent's position on the pension issue for nonstriking employees was not founded on its desire to punish strike breakers, although it may have been a welcomed consequence of its bargaining strategy. Clearly, this record reveals that the Union had both short and long term bargaining goals. Executing a side agreement permitting pension benefits for nonstriking employees would have adversely affected negotiations and would have diminished Respondent's strength with respect to future negotiations, including negotiations with other employers. In evaluating Smith's statements regarding scabs, it is critically important to consider his unrebutted testimony that he urged the Company at the July 21, 1994 meeting to make the new contract retroactive to the expiration date of the last contract. One very important effect of this proposal is that it would have provided pension benefits to all employees who crossed the picket line and worked during the strike. This proposal was rejected by the Company. In my view, this proposal along with Smith's testimony clearly establishes that Respondent's motive was not to punish nonstriking employees but to lawfully strengthen its bargaining position. In reaching this conclusion I have fully credited Smith's testimony in this regard, based on demeanor.

As I have found the complaint without merit, I shall recommend that it be dismissed.

CONCLUSIONS OF LAW

1. Interstate Brands Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent, Teamsters Local 955, affiliated with International Brotherhood of Teamsters, AFL–CIO is a labor organization within the meaning of Section of 2(5) of the Act.

3. Respondent Local 955 is the collective-bargaining representative of certain employees of Interstate in the following appropriate unit:

> All driver sales representatives, relief drivers, swing drivers, special delivery drivers, student drivers and ''supervisors'' who are not supervisors as defined in the Act, employed by Interstate and Interstate's facility located in Kansas City, Missouri, but excluding office employees, clerical employees, production of maintenance employees, supervisors within the meaning of the Act, and all other employees.

4. Ralph Smith is an agent of Respondent within the meaning of Section 2(13) of the Act.

5. By refusing to execute an agreement with Interstate which would have permitted acceptance by the Central States Pension Fund of pension contributions submitted by Interstate on behalf of the nonstriking employees, Respondent Local 955 and its agent, Ralph Smith, have not violated Section 8(b)(1)(A) of the Act by failing to fairly represent unit employees.

ORDER

The complaint is dismissed.